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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 LEO DURDEN,

9 Plaintiff,

10 v.

11 GEICO ADVANTAGE INSURANCE
12 COMPANY,

Defendant.

C17-651 TSZ

MINUTE ORDER

13 The following Minute Order is made by direction of the Court, the Honorable
14 Thomas S. Zilly, United States District Judge:

15 (1) Defendant's motion for summary judgment, docket no. 19, is DENIED.
16 Plaintiff Leo Durden was injured in an automobile accident on July 17, 2015. Defendant
17 Geico Advantage Insurance Company ("Geico") has denied benefits that would otherwise
18 be available pursuant to the underinsured motorist ("UIM") provision of an automobile
19 policy issued to plaintiff on the grounds that the accident was not caused by either a hit-
20 and-run vehicle or a phantom vehicle. For purposes of this matter, a hit-and-run vehicle
is one whose owner or operator cannot be identified and that made "physical contact"
with the insured's vehicle. See Ex. 8 to Holsman Decl. (docket no. 12-8). Contrary to
Geico's contention, whether the accident at issue was the result of a collision with a hit-
and-run vehicle (or the actions of a phantom vehicle) constitutes a genuine dispute of
material fact¹ that precludes summary judgment as to whether Geico's denial of benefits

21 ¹ In opposing Geico's motion for summary judgment, plaintiff relied on a hand-written statement
22 of an eyewitness, David Whitis, who indicated that another car struck plaintiff's car, forcing
23 plaintiff's car to spin and slide sideways off the road and through a fire hydrant. See Ex. 3 to
Batchelor Decl. (docket no. 22-3). Geico's motion, docket no. 26, to strike Whitis's statement is

1 was unreasonable and thereby gave rise to claims under the Insurance Fair Conduct Act²
2 and/or Washington's Consumer Protection Act or for insurance bad faith. See Fed. R.
Civ. P. 56(a).

3 (2) The Clerk is directed to send a copy of this Minute Order to all counsel of
4 record.

5 Dated this 16th day of March, 2018.

6 William M. McCool
Clerk

7 s/Karen Dews
8 Deputy Clerk

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11 DENIED. Although the written statement itself constitutes hearsay, Geico makes no contention
12 that the substance of Whitis's recollection could not be presented at trial in a form that would be
admissible in evidence, presumably by calling Whitis as a witness. See Fed. R. Civ. P. 56(c)(2).
13 Indeed, Geico itself interviewed Whitis and filed the transcript of such telephonic conversation
as an exhibit in connection with a discovery motion. See Ex. 2 to Holsman Decl. (docket
14 no. 12-2). In the recorded interview, Whitis repeated the same version of events he gave to
Marysville police on the date of the accident, namely that the other "dark colored car . . . lost
15 traction" and "spun in towards the red Honda," which was plaintiff's car, and "shoved him
through . . . pushed him in right about his driver's door and spun him around," causing plaintiff's
16 car to go "up onto the curb and through a fire hydrant," after which the other car "continued
going north at a high rate of speed." Ex. 2 to Holsman Decl. (docket no. 12-2 at 3). Geico
17 appears to want to strike this transcript, see Reply at 2:1 (docket no. 26) (mistakenly citing the
transcript as docket no. 12-3, instead of 12-2), but the Court declines to permit Geico to offer
18 evidence in support of one motion and then to withdraw it when it is unfavorable as to a different
motion. In addition, Geico's motion, docket no. 26, to strike plaintiff's medical bills, Ex. 2 to
Batchelor Decl. (docket no. 22-2), and the statement of facts contained in plaintiff's response,
19 docket no. 21, is DENIED.

20 ² The Washington Supreme Court has made clear that a regulatory violation is actionable under
the Insurance Fair Conduct Act only if the insurer unreasonably denied coverage or benefits.
Perez-Crisantos v. State Farm Fire & Cas. Co., 187 Wn.2d 669, 389 P.3d 476 (2017); see also
21 RCW 48.30.015(1) ("Any first party claimant to a policy of insurance who is unreasonably
denied a claim for coverage or payment of benefits by an insurer may bring an action in the
22 superior court of this state to recover the actual damages sustained, together with the costs of the
action, including reasonable attorneys' fees and litigation costs . . .").